

The Honorable John H. Chun

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

KIM SNELL,

Plaintiff,

v.

THE STATE OF WASHINGTON;  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, JUDITH A.  
FITZGERALD and UNA I. WILEY,

Defendants.

NO. 3:20-cv-06028-JHC

DEFENDANTS' REPLY IN  
SUPPORT OF THEIR MOTION FOR  
SUMMARY JUDGMENT

**I. INTRODUCTION**

Defendants Washington State, Department of Social and Health Services (DSHS), Judy Fitzgerald and Una Wiley submit this Reply in support of their motion for summary judgment. Ms. Snell asserts 42 U.S.C. §1983 claims against Ms. Fitzgerald and Ms. Wiley, alleging they violated her constitutional rights to free speech and petition the government, that all defendants violated RCW 49.60 (Washington Law Against Discrimination (WLAD)); RCW 63.60.050 (Washington

DEFENDANTS' REPLY  
IN SUPPORT OF THEIR MOTION  
FOR SUMMARY JUDGMENT  
No. 3:20-cv-06028-JHC

1 Personality Rights Act (WPRA)), and RCW 42.40 (Whistleblower Act), and that Ms. Wiley  
 2 misappropriated her identity. Dkt. 1:15.

## 3 **II. UNDISPUTED AND UNREFUTED MATERIAL FACTS**

### 4 **A. Undisputed Material Facts**

5 These facts from Ms. Snell's Response are undisputed: Ms. Snell joined the Office of  
 6 Financial Recovery (OFR) in 2014; she promoted to the Estate Recovery Program Supervisor, a  
 7 Revenue Agent 4 (RA4) position, in 2017; Shawn Hoage was her supervisor; in December 2018,  
 8 Ms. Snell complained to then OFR Chief Montgomery about Ms. Hoage's behavior and an  
 9 investigation ensued; from December 2018 until June 2019, Ms. Hoage was removed from the  
 10 office pending the investigation; Ms. Snell provided information to the investigator. Dkt. 38:3.

11 OFR created a new Management Analyst 4 (MA4) position in the spring 2019; OFR Chief  
 12 Wiley submitted a PDF for the position for approval and it was approved; OFR posted the MA4  
 13 position vacancy on the statewide job board; and OFR employee Amber Wright applied and  
 14 interviewed for, and accepted this position. Dkt. 38:5.

15 When Ms. Snell learned Ms. Hoage was returning to the office, she sent DSHS Secretary  
 16 Strange a petition objecting to her return and asserting additional complaints; a second investigation  
 17 ensued and Ms. Hoage was again placed on alternate assignment. Dkt. 38:4.

18 Sometime around August 2019 Assistant Secretary Fitzgerald became OFR's overseer. Dkt.  
 19 38:5. In August 2019 Ms. Snell applied and interviewed for, and accepted the new Collections  
 20 Manager position; on October 7, 2019, while Ms. Wiley was away, Ms. Snell met with Tiffany  
 21 Womack in Human Resources (HR) and reported concerns that Ms. Wiley: 1) forged Ms. Snell's

22 DEFENDANTS' REPLY  
 23 IN SUPPORT OF THEIR MOTION  
 24 FOR SUMMARY JUDGMENT  
 25 No. 3:20-cv-06028-JHC  
 26

1 name to the MA4 PDF which was submitted for approval; 2) took a trip to New York with her  
 2 which Ms. Snell called a “boondoggle trip”; 3) treated staff in some manner; and 4) blocked her  
 3 from filling vacant positions; Ms. Womack told her to talk to Ms. Fitzgerald; Ms. Wiley was  
 4 instructed to work with Ms. Snell and document the work; Ms. Snell met with Ms. Fitzgerald on  
 5 November 12, 2019; and in January 2020, Ms. Snell returned to her former position. Dkt. 38:4-8.  
 6

### 7 **B. Unrefuted Material Facts**

8 In her Response, Ms. Snell does not refute the following facts: Ms. Snell’s Collection  
 9 Manager position included a trial service period which she had to pass for the position to become  
 10 permanent; this was a WMS1 exempt management position; this position was not covered by  
 11 the DSHS-union collective bargaining agreement; and management could end the trial and return  
 12 her to her former position. Dkt. 38:15.  
 13

14 Ms. Snell complained to her supervisor, Ms. Wiley, in June 2019, about Ms. Hoage  
 15 returning to OFR and Ms. Wiley told her she needs to support management decisions; no  
 16 retaliation occurred between then and August 2019 after Ms. Snell having filed the petition and  
 17 in August 2019 Ms. Snell promoted to the Collection Manager position. Dkt. 38:4.  
 18

## 19 **III. POINTS AND AUTHORITIES**

### 20 **A. Ms. Snell Fails to State a §1983 Claim**

21 With regard to Ms. Snell’s §1983 claim, in their motion for summary judgment Defendants  
 22 asserted that neither a State nor its officials acting in their official capacity are “persons” under  
 23 §1983 so are not subject to §1983 claims. *Will v. Michigan Dep’t of State Police*. 491 U.S. 58, 71  
 24

25 DEFENDANTS’ REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

1 (1989). Now, for the first time in her response, Ms. Snell alleges she is suing Ms. Wiley and Ms.  
 2 Fitzgerald in their individual capacities. Dkt. 38:21.

3 It is long established that a party cannot assert a new theory of liability – effectively amending  
 4 its complaint – in response to a motion for summary judgment. *Smith v. City & Cnty. of Honolulu*,  
 5 887 F.3d 944, 951-52 (9th Cir. 2018)(defendant suffers prejudice if plaintiff is allowed to proceed  
 6 with a new theory of recovery after discovery closes); *Coleman v. Quaker Oats Co.*, 232 F. 3d 1271,  
 7 1292-93 (9th Cir. 2000)(where plaintiff fails to allege a given theory of liability in his complaint, he  
 8 is barred from proceeding on such novel theory at the summary judgment stage). The court should  
 9 reject Ms. Snell’s attempt to change her theory of liability under §1983 at this late state of litigation  
 10 and dismiss her §1983 claims for failure to state a claim. Then, with no federal claim left in Ms.  
 11 Snell’s lawsuit, the court should dismiss her state law claims without prejudice.  
 12

13 Assuming for the sake of argument, however, that the court permits Ms. Snell to move  
 14 forward with her §1983 claim, Ms. Snell still fails to state claims against Ms. Wiley and Ms.  
 15 Fitzgerald in their individual capacities. To determine whether a public employee has alleges a  
 16 First Amendment rights violation as a result of retaliation for her speech, the court must consider  
 17 whether (1) plaintiff spoke on a matter of public concern; (2) plaintiff spoke as a private citizen  
 18 or public employee; (3) plaintiff’s protected speech was a substantial or motivating factor in the  
 19 adverse employment action; (4) the state had an adequate justification for treating the employee  
 20 differently from the general public; and (5) the state would have taken the adverse employment  
 21 action even absent the protected speech. *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103  
 22 (9th Cir. 2011).  
 23  
 24

25 DEFENDANTS’ REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

1 She alleges Ms. Wiley and Ms. Fitzgerald took adverse action against her after she raised  
 2 other matters of public concern such as Ms. Hoage's homophobic remarks. Dkt. 38:14, 21. Ms.  
 3 Snell submitted her first complaint in December 2018, before either Ms. Wiley or Ms. Fitzgerald  
 4 joined OFR.

5  
 6 Ms. Snell allegations against Ms. Wiley are that in October and November 2019, she  
 7 reported Ms. Wiley's alleged improprieties and, without supporting evidence, alleges HR did  
 8 not address her complaints. Dkt. 38: 22-23. Ms. Snell provides no counter evidence to refute  
 9 Defendants' evidence that HR investigated her complaints but determined they were unfounded.  
 10 Wright and Wiley Dep transcript reference.

11 As to Ms. Wiley's alleged forgery of Ms. Snell's signature on the MA4 PDF, Ms. Snell  
 12 claims Ms. Wiley forged the PDF in late spring 2019 to enrich employee Amber Wright with a  
 13 substantial pay increase. Dkt. 38:14. Ms. Snell waited until October 7, 2019, while Ms. Wiley  
 14 was on vacation almost four months later, to report what she describes as a felony. Dkt. 38:5, 25.  
 15 From August 2019 through January 2020, while Ms. Snell was in her trial service as Collections  
 16 Manager, she received a substantial increase in pay and multiple directives from her supervisor,  
 17 Ms. Wiley, to cooperate with other managers who steadily complained that Ms. Snell interfered  
 18 with their work and personnel matters. Dkt. 34:5-6. Ms. Snell's other allegations against Ms.  
 19 Wiley are that she told her to be more supportive of management decisions, and recommended  
 20 to HR to end her trial service. Dkt. 38:6-7.

21 Ms. Snell's allegations against Ms. Fitzgerald are that she met with her once in November  
 22 2019, returned Ms. Hoage to the workplace, was the authorizing authority who signed the letter

23 DEFENDANTS' REPLY  
 24 IN SUPPORT OF THEIR MOTION  
 25 FOR SUMMARY JUDGMENT  
 26 No. 3:20-cv-06028-JHC

1 ending her trial service, told her to be supportive of management decisions, and refused to meet  
 2 with her after the trial service ended. Dkts. 1:10, 1:12, 38:6-7. Even assuming Ms. Snell reported  
 3 on her claimed improper behaviors of Ms. Wiley to Ms. Fitzgerald on November 12, 2019, Ms.  
 4 Fitzgerald testified in deposition testimony that she heard no information that led her to believe  
 5 Ms. Snell was reporting activity that were actionable to her. Dkt 33:8. The court should find that  
 6 none of these allegations, even if true, separately or together, evidence retaliation by either Ms.  
 7 Wiley or Ms. Fitzgerald against Ms. Snell for exercising her first Amendment rights.

9 Ms. Snell state in her Response that the only units not under her supervision were  
 10 Accounting and Ms. Wright's team of Administrative Assistants. Dkt. 38:7. The court could  
 11 infer from this statement that Ms. Snell believed it was part of her job responsibilities as  
 12 Collections Manager to report improper behavior. Dkt. 38:7. If such reporting is part of her work,  
 13 Ms. Snell cannot establish the second element of her First Amendment violation claim.  
 14 *Clairmont*, 632 F.3d at 1103.

16 **B. Ms. Snell Has Not and Cannot Establish a Prima Facie Case for her WLAD Claim**

17 Ms. Snell alleges all Defendants committed three acts of retaliation: Defendants "removed"  
 18 her from the Collections Manager position and Ms. Wiley recommended in October 2019 and again  
 19 in January 2020 to end Ms. Snell's trial service. Dkt. 1:13. As to Ms. Wiley's actions, Ms. Snell  
 20 argues a "cat's paw" theory that Ms. Wiley had unlawful discriminatory animus towards Ms.  
 21 Snell and so influenced the decision-making "by feeding the decision maker misinformation or  
 22 failing to reveal relevant information." Dkt. 38:20. Ms. Snell provides no evidence showing Ms.  
 23

24  
 25 DEFENDANTS' REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

1 Wiley's discriminatory animus towards her or evidence showing that she provided decision-  
 2 makers with misinformation of any kind or failed to reveal relevant information.

3 Ms. Snell does not refute Ms. Wiley's statement that when she recommended ending Ms.  
 4 Snell's trial service the first time in October 2019, the HR consultant refused her recommendation  
 5 and told Ms. Wiley to give Ms. Snell more time, to coach her and to be clear on work expectations.  
 6 Dkts. 34:6. This undisputed fact mitigates against Ms. Snell's argument that Ms. Wiley exercised  
 7 great influence over the OFR decision-makers regarding Ms. Snell's trial service. The court should  
 8 find the "cat's paw" theory is not applicable here.  
 9

10 **C. Ms. Snell Cannot Establish the Second Element of her WLAD Claim as She Fails to**  
 11 **Provide Proper Comparators**

12 To establish a WLAD discrimination case, Ms. Snell must show she (1) belongs to a  
 13 protected class, (2) was treated less favorably in terms or conditions of her employment than a  
 14 similarly situated, non-protected employee, and (3) the non-protected "comparator" was doing  
 15 substantially the same work. *Domingo v. Boeing Emps.' Credit Union*, 124 Wn. App. 71, 81,  
 16 98 P.3d 1222 (2004), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of*  
 17 *Kittitas Cnty.*, 189 Wn.2d 516, 404 P.3d 464 (2017).  
 18

19 Employees are similarly situated when they have similar jobs and display similar  
 20 conduct. *Earl v. Nielsen Media Rsch. Inc.*, 658 F.3d 1108, 1114 (9<sup>th</sup> Cir. 2011)(citing *Vasquez*  
 21 *v. County of Los Angeles*, 349 F.3d 634, 641 (9<sup>th</sup> Cir. 2003). The employees' roles must be  
 22 similar in material respects, but need not be identical. *Earl*, 658 F.3d at 1114. The employees  
 23 must also engage in problematic conduct of comparable seriousness. *Vasquez*, 349 F.3d at 641.  
 24

25 DEFENDANTS' REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

Summary judgment is proper where a plaintiff fails to provide sufficient comparators. *Hawn v. Exec. Jet Mgmt. Inc.*, 615 F.3d 1151, 1158 (9<sup>th</sup> Cir. 2010).

Ms. Snell is female which constitutes a protected class. Ms. Snell does not allege any other protected class to which she belongs. Dkts 1, 38. Ms. Snell identifies Ms. Hoage and Ms. Wiley as her comparators. Dkt. 38:16. Ms. Hoage and Ms. Wiley are also female so are similarly protected.

Employees in supervisory positions are generally deemed not to be similarly situation to lower level employees. *Vasquez*, 349F.3d at 641. The court should find, as a matter of law, that neither Ms. Hoage nor Ms. Wiley are similarly situated to Ms. Snell with regard to their work positions. During the relevant time Ms. Snell was an exempt WMS1 Collections Manager who oversaw multiple OFR Units. Unlike Ms. Snell, Ms. Hoage was a non-exempt, collective bargaining agreement protected, program manager, supervising only one unit. Dkt. 34:2. When Ms. Hoage returned to OFR in December 2019, Ms. Snell became her supervisor. Dkt. 34:2.

During the relevant time, Ms. Wiley was the OFR Chief with overall responsibility for managing OFR. Dkt. 34:11. She was Ms. Snell's supervisor. Dkt. 34-1. Ms. Wiley was not doing substantially the same work as Ms. Snell.

Despite complaints to the contrary submitted by Ms. Snell, neither Ms. Hoage nor Ms. Wiley engaged in problematic conduct of comparable seriousness. *Vasquez*. 349 F.3d at 641. Ms. Snell brought two complaints against Ms. Hoage while Ms. Hoage supervised her, subjecting Ms. Hoage to two investigations and alternate assignments for the whole year she was under investigation. It can hardly be stated that OFR "turned a blind eye" to discriminatory conduct by Ms. Hoage when she spent a year under investigation and had alternative assignments during each

DEFENDANTS' REPLY  
IN SUPPORT OF THEIR MOTION  
FOR SUMMARY JUDGMENT  
No. 3:20-cv-06028-JHC



1 of the investigations. Dkt. 34:2. Ms. Snell cannot show through Ms. Hoage that Ms. Hoage received  
 2 better treatment when under investigation.

3 Ms. Snell filed several complaints against Ms. Wiley, while Ms. Wiley was her supervisor.  
 4 HR investigated these complaints and found no irregularities. Ms. Snell offers no evidence that  
 5 anyone besides her accused Ms. Wiley of engaging in any improper behaviors. The court should  
 6 find that Ms. Wiley is not a proper comparator.  
 7

8 It is disingenuous for Ms. Snell to report improper behavior against these women, all of  
 9 which were unfound after investigation, and then claim them to be comparators who received  
 10 better treatment than she did. The court should find, as a matter of law, that neither Ms. Hoage nor  
 11 Ms. Wiley are proper comparators for Ms. Snell and this failure is fatal to Ms. Snell's WLAD  
 12 claims.  
 13

14 **D. Defendants Have Produced Legitimate, Nondiscriminatory Reasons for Taking**  
 15 **Actions Against Ms. Snell**

16 In defense against Ms. Snell's WLAD claims, Defendants have articulated legitimate,  
 17 nondiscriminatory reason for the challenged action. *Chang v. Univ. of Cal. Davis, Bd. Of Trs.*,  
 18 226 F.3d 1115, 1123-24 (9<sup>th</sup> Cir. 2000); Washington citation. Defendants have the burden of  
 19 production, not persuasion at the summary judgment stage. *Chang*, 226 GF.3d at 1123-24.  
 20 Defendants provided unrefuted evidence that Ms. Snell knew when she started as Collections  
 21 Manager that she was in a trial service period. Defendants also provided the court with unrefuted  
 22 evidence that Ms. Wiley instructed her on multiple occasions to stop interfering with the work  
 23 and personnel matters of other managers and of instances where Ms. Snell refused to complete  
 24

25 DEFENDANTS' REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

1 tasks directed by Ms. Wiley. Dkt. 34:6-7. Ms. Snell's admission to Ms. Wiley that she engaged  
 2 in mock interviews with her favored internal candidates for OFR job vacancies led Ms. Wiley to  
 3 recommend to HR in January 2020 to end Ms. Snell's trial service. Dkt. 34:7. The court should  
 4 find Defendants produced sufficient evidence of legitimate, non-discriminatory reasons for  
 5 ending Ms. Snell's trial service in January 2020.  
 6

7 Defendants additionally assert they are entitled to the "same actor inference" which  
 8 provides that "Where the same actor is responsible for both the hiring and the firing of a  
 9 discrimination plaintiff, and both actions occur within a short period of time, a strong inference  
 10 arises that there was no discriminatory action." *Crudder v. Peoria Unified Sch. Dist. No. 11*, 468  
 11 F. App'x 781 (9<sup>th</sup> Cir. 2012); *Cooper v. Window Rock Unified School District*, Case No. CV-20-  
 12 08346-PCT-DJH, 2023 WL 2463765 at \*8 (U.S.D.C. Arizona, March 10, 2023)(quoting *Bradley*  
 13 *v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9<sup>th</sup> Cir. 1996). In *Crudder*, the Defendant  
 14 successfully asserted the same-actor inference when a school superintendent initially  
 15 recommended to the governing board that plaintiff be promoted to a principle position, and later  
 16 rescinded his recommendation. *Crudder*, 468 F. App'x at 783.  
 17

18 The parties do not dispute that Ms. Wiley supported and recommended Ms. Snell for the  
 19 Collections Manager position in August 2019 and, then two months and five months later, in  
 20 October 2019 and in January 2020, recommended to ending Ms. Snell's trial service. Dkt. 34:6-  
 21 7. The court must take this strong inference of non-discrimination into account in considering  
 22 Defendants' summary judgment motion. *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090,  
 23  
 24

25 DEFENDANTS' REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

1 1098 (9<sup>th</sup> Cir. 2005)(applying the same-actor inference where a same decision maker demotes  
 2 the plaintiff to a lesser role).

3 The burden shifts back to Ms. Snell to provide the court with evidence showing  
 4 Defendants' articulated reasons for ending her trial service was a pretext for their discriminatory  
 5 actions. *McGinest v. GTE Serv. Corp.* 360 F.3d 1103, 1112 (9<sup>th</sup> Cir. 2004); Ms. Snell must make  
 6 an expressly strong showing of discrimination to survive summary judgment. *Blair v. Shulkin*,  
 7 685 F. App'x 587, 587 (9<sup>th</sup> Cir. 2017); *Hawn*, 615 F.3d at 1158 (affirming summary judgment  
 8 when Plaintiff fails to provide the court with sufficient comparators). Without proper and  
 9 sufficient comparators, the court should hold that as a matter of law, Ms. Snell cannot establish  
 10 her WLAD claims.  
 11

12  
 13 **E. Ms. Snell Fails to State a Claim under RCW 42.40 That Defendants Violated**  
 14 **Her Rights as a Whistleblower**

15 To establish a prima facie case of retaliation for being a whistleblower, an employee must  
 16 show that 1) she engaged in a statutorily protected activity (filing a whistleblower complaint),  
 17 2) the employer took an adverse employment action, and 3) the adverse action was caused by  
 18 the employee's activity. Dkt. 38:25. Ms. Snell fails to provide the court with evidence that she  
 19 either filed her complaint with the State Auditor's Office or with another authority who is  
 20 statutorily authorized to receive such claims. Dkt. 38. Ms. Snell alleges she met with Ms.  
 21 Fitzgerald on November 12, 2019, and reported all of her concern of improper behavior by Ms.  
 22 Wiley. Dkt. 38:6. As an Assistant Secretary Ms. Fitzgerald is authorized to receive such reports,  
 23 however, she does not recall Ms. Snell giving her statements indicating these were whistleblower  
 24

25 DEFENDANTS' REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

1 complaints or that alerted her of a need to forward such information to the State Auditor's Office  
2 or to HR to investigate.

3 Ms. Snell provides no evidence that Ms. Wiley was aware Ms. Snell had made reports of  
4 improper behavior against her. Consequently, Ms. Snell cannot establish a causal connection  
5 between Ms. Snell's filing of complaints against Ms. Wiley and Ms. Wiley recommending to  
6 end Ms. Snell's trial period that would show retaliation.  
7

8 **F. Ms. Snell Has Not and Cannot Establish a Forgery or WPRA Claim**

9 **1. Ms. Snell Cannot Prove a Forgery/Misappropriation by Ms. Wiley**

10 First and foremost, Ms. Snell provides no evidence that Ms. Wiley forged Ms. Snell's  
11 signature on the MA4 PDF. To establish forgery, Ms. Snell must submit evidence that Ms. Wiley  
12 falsely made, completed, or altered a written instrument, with the intent to injure or defraud, and  
13 possessed, uttered, offered, disposed of, or put off as true a written instrument which he or she  
14 knows to be forged. RCW 9A.60.020. Ms. Snell specifically claims that Ms. Wiley's purpose in  
15 forging the PDF was to elevate employee "Ms. Wright from a salary level 31 to a level 58",  
16 "boost the pay of a government employee", and bypass the open and competitive hiring process.  
17 Dkts. 38:24. Ms. Snell presents no evidence of Ms. Wiley's intent to injure or defraud Ms. Snell or  
18 DSHS by forging Ms. Snell's name on the PDF. Dkt. 38. Ms. Snell presents no evidence that Ms.  
19 Wiley herself physically "made, completed or altered" the PDF. Dkt. 38. Finally, Ms. Snell  
20 presents no evidence that Ms. Wiley offered the PDF anyone knowing the form to be forged.  
21 The court should hold Ms. Snell fails to state a claim against Ms. Wiley for misappropriating  
22 Ms. Snell's name through forgery.  
23  
24

25 DEFENDANTS' REPLY  
26 IN SUPPORT OF THEIR MOTION  
FOR SUMMARY JUDGMENT  
No. 3:20-cv-06028-JHC

1           **2. Ms. Snell Cannot Establish a Washington Personality Rights Act Claim**

2           Ms. Snell cites to *Immelt v. Bonneville*, an unreported Washington appellate case in  
 3 which the court found a real estate appraisal, a written report created in a commercial setting,  
 4 was a “good” within the definition of RCW 63.60 for the proposition that because the terms  
 5 “goods, merchandise, or products” are not defined in RCW 63.60, “[t]here is no reason why the  
 6 protection should not extend to a forgery fraudulently used to boost the pay of a government  
 7 employee.” Dkt. 38:24. There is an evident reason why the statutory protection does not extend  
 8 to a PDF. The statute requires that to be a violation the person’s name or signature must be on  
 9 or in goods, merchandise, or products entered into Washington state for commercial purposes,  
 10 to commercially advertise products, merchandise, goods, or services within the state or to fund-  
 11 raise or solicit donations within the state. RCW 63.60.050.

12           Ms. Snell admits there is no case law to support her argument the PDF qualifies as a good,  
 13 merchandise or product placed into the stream of commerce within Washington State. Dkt. 38:24.  
 14 Moreover, Ms. Snell provides no evidence to refute Defendants’ evidence that it was likely an office  
 15 assistant made an administrative error when copying a number of PDFs at one time. Dkt. 34:3.

16           Further, Ms. Snell presents no evidence that the posting on the statewide job website showed  
 17 a defective PDF. Dkt. 38. Ms. Snell’s citation to a case dealing with a real estate appraisal is  
 18 inapposite. Dkt. 38:24. Ms. Snell submits no copy of the allegedly forged PDF. She only alleges her  
 19 name was found on a copy of a PDF that HR received. Dkt. 38:25; RCW 9a.60.020. Ms. Snell  
 20 cannot establish a WPRA claims against Ms. Wiley.

21           //

22           DEFENDANTS’ REPLY  
 23           IN SUPPORT OF THEIR MOTION  
 24           FOR SUMMARY JUDGMENT  
 25           No. 3:20-cv-06028-JHC

**G. Court Should Deny Ms. Snell's Motion to Strike Testimony Claimed as Hearsay**

Ms. Snell moves to strike certain parts of several defendants' declarations on the grounds of hearsay. Dkt. 38:26. At the summary judgment state, the court does not focus on the admissibility of the evidence's form and, instead, focuses on the admissibility of its contents. *Fraser v. Goodale*, 342 F.3d. 1032, 1036 (9th Cir. 2003). Hearsay evidence produced in an affidavit may be considered on summary judgment if the declarant can later present the evidence through direct testimony. *Fraser*, 343 F.3d at 1037. *See Williams v. Borough of W. Chester*, 891 F.2d 458, 465 n. 12 (3d Cir. 1989)(hearsay evidence produced in an affidavit in summary judgment motion may be considered if the out-of-court declarant could later present that evidence through direct testimony).

As to the specific paragraph of Ms. Wiley's declaration that Ms. Snell seeks to strike. Paragraphs 4, 5, 9, 15, 16, 17, 18 and 20 all contain statements Ms. Wiley declares is based on her personal knowledge. Dkt. 34:1. Statements Ms. Wiley makes in Paragraph 4 contains information that Ms. Snell discusses in her Response. Dkt. 38:2. To the extent Ms. Wiley recounts what she heard another other OFR employees said to her, the out-of-court declarants are current or former DSHS employees who can present the evidence through direct testimony, a form that is admissible at trial. Declaration of Michelle Hansen, dated March 24, 2023 (Hansen 3/24/23 Decl.) at ¶ 4.

Similarly, the statements in Paragraph 6, 8, 9 of Ms. Fitzgerald's declaration which Ms. Snell seeks to strike are all statement which Ms. Fitzgerald is recounting that she personally heard her employees say to her. Dkt. 33:1. To the extent these statement made by OFR

DEFENDANTS' REPLY  
IN SUPPORT OF THEIR MOTION  
FOR SUMMARY JUDGMENT  
No. 3:20-cv-06028-JHC

1 employees out-of-court, these declarants can present the evidence through direct testimony at  
 2 trial. Hansen 3/24/23 Decl. at ¶ 4. The statements in Paragraph 9 of Ms. Wright's declaration  
 3 are statements she makes from her personal knowledge. Dkt. 35:1.

4 As to Exhibit B to Ms. Wiley's Declaration, Ms. Wiley declared that this document is a  
 5 true and correct copy of her log of events which admissible under Federal Rules of Evidence  
 6 801(c) as a business record. Moreover, the contents of Ms. Wiley's log are recitations of events  
 7 within Ms. Wiley's personal knowledge and could be admitted into evidence at trial by Ms. Wiley  
 8 testifying from her personal knowledge what she had written in her log at the time of the event.  
 9 The court should hold that the contents in these declarations and business record can be presented  
 10 in an admissible form at trial and, on this basis, the court should deny Ms. Snell's motion to strike.  
 11

12 **H. Ms. Snell Did Not Amend Her Complaint to Add Any Allegations in Her Second Tort**  
 13 **Claim**

14 Ms. Snell claims Defendants did not address allegations from her second tort claim filed  
 15 with the State. Dkt. 38: 7. Ms. Snell did not amend her Complaint. Therefore, the court should  
 16 hold that any allegations in her second tort claim are not a part of this lawsuit.  
 17

18 **IV. CONCLUSION**

19 For all of the foregoing reasons, Defendants request that the court grant its summary  
 20 judgment motion, dismiss the §1983 claim with prejudice, dismiss the state claims without  
 21 prejudice, and deny Plaintiff's motion to strike.  
 22

23 //

24 //

25 DEFENDANTS' REPLY  
 26 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT  
 No. 3:20-cv-06028-JHC

1 DATED this 24th day of March, 2023.

2 I certify that this memorandum contains 4,033 \_\_\_\_\_  
3 words, in compliance with the local civil rules.

4 ROBERT W. FERGUSON  
5 Attorney General

6 s/Michelle Hitomi Hansen  
7 MICHELLE HITOMI HANSEN, WSBA No. 14051  
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25 DEFENDANTS' REPLY  
26 IN SUPPORT OF THEIR MOTION  
FOR SUMMARY JUDGMENT  
No. 3:20-cv-06028-JHC



**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of March, 2023, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Plaintiff's Attorney:

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DATED this 24th day of March, 2023.

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Attorney General

s/Michelle Hitomi Hansen  
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